

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: **2069/2016**

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

31/3/2017

In the matter between:

H V

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MALI J

[1] The plaintiff, described herself as a fifty two year old divorcee and a single parent of a twenty three year old. She sued the defendant for damages resulting from injuries she sustained in a motor vehicle accident on 9 October 2011.

[2] The claim is in respect of loss of income and general damages only merits having been settled. The defendant agreed to furnish the plaintiff with an undertaking in respect of future medical expenses in terms of **section 17(4)(a) of the Road Accident Fund**

Act 56 of 1996 (section 17(4)(a)).

FACTUAL BACKGROUND

[3] It is common cause that at the time of the accident the plaintiff was unemployed. She commenced her working career in 1982 at Telkom where she was in charge of Electronic Telecommunications Exchange. She attended internal courses on information technology and later qualified as an Information Technology Specialist (*"IT specialist"*).

[4] She worked for Telkom until 2005 when she took a voluntary package and opened a restaurant. Whilst she was running her business she was invited to lecture on Software designs at Botlhabela College in Bronkhorstpruit from 2010 to 2011. Thereafter she worked for Eskom (Kusile Power Station under Roshcom) attending to all electrical cable works. She stopped working for Eskom shortly before the collision.

[5] According to the Orthopaedic Surgeon's report the plaintiff suffered bodily injuries described as follows:

- (i) An intra- articular fracture of the right subtalar joint;
- (ii) Lacerations on her forehead;
- (iii) A soft tissue injury to the thoracic spine;
- (iv) A soft tissue injury to the lumbar spine;
- (v) A soft tissue injury to the cervical spine;
- (vi) An injury to her chest;
- (vii) A fracture of the right distal radius;
- (viii) A head injury
- (ix) A soft tissue injury to the left shoulder;
- (x) A soft tissue injury to the right shoulder;
- (xi) A soft tissue injury to the right knee;
- (xii) A soft tissue injury to the left knee;

[6] In the report of Ingrid Jonker, Counselling Psychologist (with special interest in Neuropsychology), the plaintiff suffered bodily injuries described as follows:

- (i) Lacerations on her forehead;
- (ii) An injury to the neck;
- (iii) Four fractured ribs to the right ribcage;
- (iv) Three fractured ribs to the left ribcage;
- (v) A fractured right hand;
- (vi) A fractured left wrist;
- (vii) An injury to her lower back;
- (viii) A haematoma to her right thigh;
- (ix) A fractured coccyx;
- (x) A fractured right foot;
- (xi) A fractured left toe;
- (xii) Lacerations to both lower legs.

[7] Details of the accident are common cause between the parties. The defendant did not produce any expert reports and relied on the plaintiff's expert reports.

PLAINTIFF'S EVIDENCE

[8] Plaintiff testified that as a result of the accident she suffered terrible migraine headaches, pain in the back and neck as well as both of her shoulders. She had difficulty breathing because of the pain in her chest. Her knees were lacerated, she had contusion in her legs and her left big toe was broken.

[9] She further stated that her foot was put in plaster at Kalafong hospital where she was first attended to and was later operated on during December of 2012 more than a year post accident.

[10] The plaintiff testified that while she was still in hospital she was offered employment at Makhado Chain Store in Limpopo as an IT Systems Administrator. She was employed on six months renewable contract. Although she was expected to start on 1 December 2011 she commenced with her duties on 3 January 2012. The reason for her late start was that the employer had to allow her time to heal from her injuries as she attended the interview whilst she was still on crutches. The employer was prepared to

wait due to her expertise.

[11] Plaintiffs day to day duties involved maintenance of IT systems, software and maintenance support and servers for all the branches of her then employer. She stated that she was experiencing lot of pain as her job involved physical movement. The contract was not renewed and she was not given reasons for the non-renewal of her contract.

[12] Under cross examination the plaintiff testified that she cannot specialise on IT development because it involves a lot of sitting and she cannot sit for more than half an hour a time. According to her the IT industry is looking for the entire package from any employee; inclusive of physical movement. The plaintiffs version was not challenged.

[13] On 3 July 2012 the plaintiff commenced working for ISOQ Consulting. Her mandate involved the development of the IT systems project for the company from scratch. As she progressed with her work the company increased the staff personnel from 15 to 45. The plaintiff was in charge of the IT systems for all of personnel. The systems involved setting up a server, switchboard, the buying of new computers, installing and setting up of pastel accounting software, arranging satellite intranet. The plaintiffs testimony is that the type of work was very physical involved and she had to move up and down, and sometimes had to climb the roof. She stated that she experienced a lot of pains in her foot, back, neck and suffered constant headaches.

[14] What further exacerbated the plaintiff's situation is that she had to drive from Pretoria East where she stayed to Midrand, her workplace. She later realised that her lower back was also broken. She discovered this when she attended one of her regular sessions related to migraine headaches with various doctors. She testified that she was later retrenched from ISOQ. The retrenchment occurred after she attended a disciplinary hearing because of her absence due to medical reasons.

[15] Under cross examination she testified that she assumed she was retrenched because of her regular absence from work as she was not afforded reasons for her retrenchment. She further stated that she took up the matter with CCMA through her erstwhile attorney who seemingly never prosecuted the matter. However at page 125 of

the Trial Bundle the following information is found on the retrenchment letter from ISO-Q Consulting, signed by Robert Tom Rioga, dated 18 February 2014:

"...This letter serves as formal communication of intention to retrench as your post has become superfluous to Company requirements. As discussed the staff compliment in the Administration Department is being reduced in a bid to contain costs in line with reduced levels of business and income from Eskom. We have discussed various alternatives including redeployment to the Training Department which has proven too costly and unworkable ..."

[16] She further testified that she has the ability to train people however driving and sitting in front of a class would be her major challenge. In re-examination she testified that technology changes rapidly it would not be easy for her to go back without being retrained, despite the challenges of the oversaturated industry.

[17] The plaintiff has looked for employment and has been unsuccessful in doing so. She has given up searching for work and she currently stays with her brother and sister in-law who look after her. Plaintiff has also come to the realisation that she cannot do sedentary work and or any day job as she is still experiencing pains.

[18] The plaintiff states that she has been affected in various ways as she sweats at night, has nightmares, in the nightmares she always sees oncoming cars and hears screeching brakes. She struggles to sleep in a normal position because of back pains. She cannot sit for longer periods and cannot ascend the steps with ease and she cannot pick heavy objects because of her injured wrist.

[19] The plaintiff further stated that she has difficulties in working on computers, the area of her training. When she uses a mouse for long periods her hand gets stiff. She cannot work in stooped position, and is neither able to use bath and always takes a shower. She is suffering emotionally as she is depressed and is not interested to go out. She feels invisible as she cannot get employment and is always in pain. She has gained more than 40 kilograms of weight of since the accident.

[20] The plaintiff testified that if she had been injured she would be working in the

Electronics and Technology fields. As indicated above the field is overpopulated hence it is difficult for her to obtain employment. The defendant could not gainsay the plaintiff's version except to point out that the plaintiff's experts reports do not say she cannot work.

REPORTS OF EXPERTS

MS INGRID JONKER -COUNSELLING PSYCHOLOGIST

[21] Ms Ingrid Jonker ("Jonker") stated as follows *inter alia* in respect of the present complaints:

"6.2 Upon direct questioning, the following difficulties were reported:

6.2.1. Mental slowing: Ms V has been experiencing mental slowing and her mind has no longer felt as sharp as before.

6.2.2. Multi -tasking: She stated that she has been experiencing a decreased ability to multi- task post accident.

6.2.3. Dysnomia: The plaintiff stated she has been experiencing word- finding difficulties since the accident.

[22] Jonker is of the opinion that the fact that the plaintiff sustained a mild concussive head injury should not result in long-term cognitive difficulties since the majority of head injuries of this nature does not result therein. (See 10.4.1.6 page 29 of her report Page 107 Trial bundle). At page 30 paragraph 10.4.1.9 Jonker opines: "*Therefore, her current neuropsychological presentation is considered to be the result of psychological difficulties associated with depression and posttraumatic stress symptomatology as well as anxiety, exacerbated by ongoing pain ... 10.4.2.1.1 A depressed mood on a daily basis due to her inability to function at her pre-accident level and the loss of her employment and independence. The plaintiff stated that she has also been experiencing increased levels of irritability as well as anger outbursts; ...*"

[23] At page 34 paragraph 10.5.4.2 Jonker *inter alia* reported:

"A comprehensive neuropsychological assessment demonstrated cognitive vulnerabilities which are expected to adversely affect Ms V's efficiency and

consistency in the open labour market, should she manage to secure a position. In this regard, her fluctuating attention; psychomotor slowing; rote verbal memory difficulties; concept generation difficulties; as well as her manual dexterity problems have rendered her less competitive in the open labour market".

DR THEO ENSLIN- INDEPENDENT MEDICAL EXAMINER

[24] Dr Theo Enslin ("*Theo Enslin*") examined the plaintiff on 15 November 2016. At page 4 of his report page 48 of the Trial bundle the outcome diagnosis is recorded as follows:

- Subtalar arthodesis of the right foot.
- A healed right distal radius fracture.
- Cosmetic disfigurement.
- A strain of the right shoulder.
- A strain of the left shoulder.
- Chondromalacia of the right knee.
- Chondromalacia of the left knee.
- Costochondritis of the chest.
- Ingrown toe nail in the left foot.
- A whiplash injury to her cervical spine.
- Mechanical back pain in the lumbar spine.
- Mechanical back pain in the thoracic spine.
- A Post Traumatic Stress Disorder and depressed mood.

At page 9 Theo Enslin opines that the plaintiff has suffered serious long term impairment and permanent serious disfigurement. She will benefit from future conservative and probably surgical treatment.

FRIZELNA STEYN MEDICO • LEGAL OCCUPATION THERAPY REPORT

[25] Frizelna Steyn ("*Steyn*") conducted an evaluation of the plaintiff on 27 October 2016. At page 19 of his report page 72 of the Trial bundle the following is stated:

"4.IMPLICATIONS OF THE OCCUPATIONAL THERAPY FINDINGS ON THE ABILITY TO WORK

The purpose of this section is to predict the claimant's vocational potential and subsequent loss of earnings through consolidating occupational therapy assessment findings, the claimant's educational background and work background.

The finding of the occupational therapy assessment reveal major challenges relating to pain in the spine, extending from the neck o the lower back, the shoulders, the knees and the wrists, the right hand and the right foot. She had a limping gait pattern and walked at a slow pace. The pain she experienced was exacerbated when standing and walking, sitting, climbing stairs and lifting objects. She was unable to squat and she experienced increased pain when kneeling and stooping. It is therefore expected that she will struggle with tasks requiring body agility and flexibility, maintaining static postures and tasks requiring mobility skills. The right wrist and foot were swollen with a 1cm difference in circumference. The left arm and leg were substantially larger than the right arm with a difference of 6cm in the upper arms and 4cm in the thighs. The claimant displayed decreased hand grip strength in both hands. She had decreased right foot movements and she was unable to lift objects weighing more than 5kg on a frequent basis. Additionally, Ms V reported severe mood challenges and she scored 53 on a self-report depression questionnaire. Such a score is associated with extreme depression ... When the writer considers Ms V's residual functional capacity, the writer is of the opinion that she will currently not be able to cope with a full day's work. Her work tolerance has been diminished by the pain she is experiencing as well as her mood challenges"

[26] The findings of the orthopaedic Surgeon Dr B. Enslin and Mr N.J. van Niekerk the Industrial Psychologist are incorporated in the submissions and analysis under the headings of loss of income and general damages.

LOSS OF INCOME

[27] The well established principle of calculating loss of income is found in **Southern Insurance Association Ltd v Bailey NO¹**, wherein the following is stated:

"Any enquiry into the damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative...."

[28] In the present matter the use of actuarial calculations has been accepted to be the viable approach. The report of the Actuary incorporates the findings of N.J. van Niekerk ("van Niekerk") the Industrial Psychologist. According to the Actuary report of HLM du Plessis compiled on 1 February 2017 the total loss of past earnings amounts to R402.472.00. Mr Du Plessis used the assessments of industrial psychologist as to the career path likely to be followed by the plaintiff.

[29] Mr Du Plessis has calculated the total loss of future earnings to be R2000 975.00. The actuary bases the Pre- accident ('but for the accident') income on the assumption that the plaintiff would have been unemployed due to retrenchment until 30 November 2014. The report of the actuary states: *"The plaintiff would then obtain employment from 1 December 2014 earning R237 640 per annum in April 2016 monetary terms, steadily*

¹ 1984 (1) SA 98 (A) at 113F- 114 A

progressing to R293 620 per annum in April 2016 monetary terms from age 55... I assume that the plaintiff would have retired at the age of 64 (sic) years". The above calculations have allowed for regular inflationary adjustments to the plaintiff's hypothetical income thereafter, commensurate with the extent expected for the general employed population, until retirement.

[30] In respect of the post-accident ('having regard to the accident') income the assumption is that the plaintiff would have earned the same as in pre-accident scenario until 28 February 2014. The Actuary further assumed that as at 1 March 2014 the plaintiff was retrenched and would have earned nil income thereafter.

[31] The actuary took into consideration income tax, earning escalation rates, investment and mortality and application of the cap provided for in section 17 (4)(c) of the Road Accident Fund Act, No 56 of 1996.

[32] I understand the defendant's contention to be the loss of future earnings. The defendant did not call any witnesses and it neither submitted any experts report. The defendant's case is centred on one aspect that the plaintiff will cope with half a day's work. In essence the defendant's case is that the plaintiff is able to obtain employment despite the plaintiff's testimony that she is unable to secure employment.

[33] Ms Erasmus, Counsel for the defendant argued that the plaintiff is highly skilled. She was employed by ISO-Q consulting for a period of 19 months and her retrenchment had nothing to do with her injuries. I fully agree that the plaintiff's retrenchment at ISO-Q consulting is clearly recorded as the company's cost containing measures which covered 24 full time employees. Be that as it may the plaintiff's sequelae and the impact thereof is well documented by various experts and is not disputed by the defendant.

[34] The defendant's argument disregards the injuries of the plaintiff as documented by the experts. See paragraphs 24 and 25 above. The defendant also does not take into account the various experts reports or example; *van Niekerk* at page 24 - 25 of his report at page 138 of the Trial bundle surmise as follows:

"Ms. V is currently 52 years of age. Despite her extensive work

experience/expertise, especially in the IT environment, she has been unable to secure any employment on the open labour market for the last almost 3 years. Bearing in mind expert opinion indicated above regarding her remaining accident- related pathology this seems justifiable. It is indeed the writer's view that she is unlikely to secure any employment on the open labour market in the foreseeable future. Furthermore it seems that, even following the recommended treatment regime, her symptoms are likely to get progressively worse, subsequently reducing her already significantly reduced work capabilities even further. Writer Is thus of view, for reasons discussed above, and bearing in mind that she has been out of the labour market for almost 3 years, which is significant in an IT environment, with symptoms that are likely to get progressively worse, Ms. V is unlikely to secure employment on the open labour market in future and she is likely to remain unemployed for the remainder of her work life." OWN EMPHASIS

[35] Having regard to the above I find that the plaintiff has suffered loss of income including loss of future earnings. This is due to the lack of employment opportunities for her because of the accident.

CONTINGENCY

[36] Contingencies have been described as the normal consequences and circumstances of life, which beset every human being and which directly affect the amount that a plaintiff would have earned **AA MUTUAL INSURANCE v VAN JAARSVELD**.² In his book *The Quantum Yearbook*, Koch states that when assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation..... The deduction is in the prerogative of the court. General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, loss of employment, promotion prospect, divorce etc.

[37] Koch refers to the following as some of the guidelines a regards contingencies:

² 1974(4) SA 729 (A)

- "Normal contingencies" as deductions of 5% for past loss and 15% for future loss.
- Sliding scale: 1/2 % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age and relies on **Goodall v President Insurance**³.
- Differential contingencies are commonly applied, that is to say one percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident.

[38] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with the necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than to accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.

[39] I am of the view that deductions of 5% contingency for past loss presents a fair value and 15% deduction in respect of future loss of income will fairly compensate the plaintiff for the loss suffered as a result of the accident. An amount of R20.123.60 representing 5% contingency is to be deducted from the past loss of income of R402.472.00. In the result the net past loss income amounts to R382.348.40. An amount of R300.146.25 representing 15% contingency is to be deducted from the amount of R2.000.975.00 representing an amount of future loss of income. In the result the net future loss of income amounts to R1.700.828.75

GENERAL DAMAGES

[40] The plaintiff claims a sum of R500.000.00 in respect of General damages. Plaintiff's counsel referred the court to the case of **Abrahams v Road Accident Fund**⁴. The case was decided in 2012 and the plaintiff was awarded R500.000.00 in general damages.

³ 1978 (1) SA 389

The plaintiff a 41 year old male employed as a spray painter suffered shortening of the right lower limb with the need to wear an assistive device. Secondary osteoarthritis in the left knee. Limitation of range of motion and pain in the right hip, knee and ankle. Plaintiff was found to have pre-existing generalised anxiety disorder and social phobia exacerbated and was rendered unemployable.

[41] Counsel for the plaintiff also referred to **Noble v Road Accident Fund**⁵. The plaintiff was a 36 year old male who was contracted to a firm of attorneys. He amongst others, suffered head and brain injuries, shortening of the right leg and rotational deformity, fractured right tibia rendering ongoing pain and difficulties, soft tissue spinal injury rendering chronic neck and pain and cervicogenic headaches; lower back pain associated with the shortening of the right leg. He was awarded R600.000.00 in general damages.

[42] In the present case although the plaintiff's sequelae is somewhat similar to the cases above, the plaintiff did not sustain brain injuries and shortening of limbs. The nature extent of the plaintiff's pain and suffering and loss of amenities of life are well documented in the various medical reports. It is unequivocally accepted that the plaintiff will never enjoy life in the same manner before the accident.

[43] Having stated the above, I am mindful of the caution in **De Jong v Du Pisanie N.O.**⁶ at paragraph 60 wherein the court, after noting the tendency towards increased awards in respect of general damages in recent times, was readily perceptible and re-affirmed conservatism as one of the multiple factors to be taken into account in awarding damages. The court concluded that the principle remained that the award should be fair to both sides, it must give just compensation to the plaintiff, but not pour out largesse from the horn of plenty at the defendant's expense, as pointed out in **Pitt v Economic Insurance Co Ltd**⁷. On the issue of awarding quantum, a court has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. It has been said that there is no hard and fast rule of general application requiring a court to consider past awards.

⁴ EC High Court, Case no: 1531/2010

⁵ South Gauteng High Court, case No 3925412008 decided on 24 February 2011

⁶2005 (5) SA 547 (SCA)

[44] It is generally accepted that it could be difficult to find a case on all fours with the one being heard and that awards in deciding cases should be considered only as a guide of how other courts arrived at an award. See in this regard **Protea Insurance Company v Lamb**⁸.

[45] It has been conceded on behalf of the defendant that a sum of R500.000.00 is a fair and reasonable amount.

[46] In assessing general damages the report of Dr Enslin at page 50-53 of the trial bundle was considered. At page 6 of the report the following is stated;

"4 INDIVIDUAL CIRCUMSTANCES:

- *Ms. V's impairment has had a negative influence on her general amenities, working ability and appearance.*
- *She participated in karate and was busy with her black belt second dan (sic) when the accident occurred on 09.10.2011."*

[47] At page 7 and 9 of Dr Enslin's report the following is stated;

"INDIVIDUAL CIRCUMSTANCES

- *Ms. V's impairment has had an negative influence on her general amenities, working abilitiy and appearance.*
- *Her pain and limitations of movement cause restraints that do not allow her to work at the same level as before.*
- *She participated in karate and was busy with her black belt second dan when the accident occurred on 09.10.2011.*
- *She had no symptoms in her neck, back, shoulders, knees, chest, right ankle, feet or right wrist and has not been involved in motor vehicle accidents prior to or after 09.10.2011.*
- *She did not belong to a medical aid at the time of the accident.*

⁷ 1975 (3) SA 264 (N) at 267

LEVEL OF DEGREE OF CHANGES:

- *She has unsightly scars over both knees and face. She is very aware of these scars and attempts to hide them. A survey recently conducted through social media outlets in South Africa showed that about 40% of women are self-conscious about the scars which can cause feelings of embarrassment, anger, fear, anxiety and sadness. Psychological impacts are associated with scars from auto accidents, violent crimes and serious burns. Scar victims have less success in job applications; their lack of confidence being as important as the potential employers' reaction to their psychological appearances.....*

In view of the multiple and serious injuries sustained on 09.10.2011, writer is of the opinion that Ms.sen V suffered serious long term impairment and permanent serious disfigurement. She has not reached the 30% whole person impairment, but qualifies under the Narrative Test, which warrants an award for general damages"

[48] Having regard to the above and taking into account the sequelae of the plaintiffs injuries I find that an amount of R500 000.00 is the correct award for general damages.

[49] The plaintiff's claim is calculated as follows:

Past medical expenses:	R36.592.07
Past loss of earnings:	R382.348.40.
Future loss of earnings:	R1.700.828.75
General damages:	R500.000.00

ORDER

I accordingly make the following order:

1. The defendant shall pay the plaintiff the sum of R2.619.769.22.
2. The defendant is to provide the plaintiff with a section 17 (4) (a) undertaking in respect of future medical expenses.
3. The defendant shall pay the plaintiff taxed or agreed party and party costs

o which costs should also include the preparation , reservation and attendance fee of the following plaintiff's experts as well as their costs for preparing the medico legal reports:

- (i) Orthopaedic Surgeon: Dr Hans B Enslin
- (ii) Independent Examiner: Dr Theo Enslin
- (iii) Industrial Psychologist: Mr N.J.Van Niekerk
- (iv) Counselling Psychologist: Ingrid Jonker
- (v) Actuary: Mr MHL Du Plessis

NP MALI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Counsel for the Applicant:	Adv. De Wet
Instructed by:	DELLOW ATTORNEYS
Counsel for the Respondent:	Adv. Erasmus
Instructed by:	TAU PHALANE INCORPORATED
Date of Hearing:	1 February 2017
Date of Judgment:	31 March 2017